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Nos. 00-568 and 00-809

IN THE
Supreme Court of the United States

NEW YORK, *et al.*,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

ENRON POWER MARKETING, INC.
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT ELECTRIC POWER SUPPLY ASSOCIATION IN SUPPORT OF PETITIONER ENRON POWER MARKETING, INC.

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RULE 29.6 STATEMENT

The Electric Power Supply Association has no parent corporation and no publicly held stock.

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BRIEF FOR RESPONDENT ELECTRIC POWER SUPPLY ASSOCIATION IN SUPPORT OF PETITIONER ENRON POWER MARKETING, INC.

The Electric Power Supply Association ("EPSA") is the national trade association representing competitive suppliers of electric power throughout the United States. EPSA's members are dependent upon transmission-owning electric utility companies for the interstate transmission services needed to deliver wholesale power to their customers for ultimate distribution to retail customers.

EPSA submits this brief in support of Petitioner Enron Power Marketing, Inc. ("Enron"), to bring to the Court's attention matter relevant to an understanding of the practical impacts of the jurisdictional issues in this case. In this brief, EPSA explains how the Federal Energy Regulatory Commission's ("FERC") failure to exercise jurisdiction under the Federal Power Act ("FPA") over interstate electric transmission bundled with retail sales of power—which constitutes the majority of interstate electrical transmissions—has resulted in a regulatory gap that gives vertically integrated electric utilities significant advantages over, and incentives to discriminate against, other interstate users of the utilities' transmission systems. EPSA incorporates herein the introductory sections of Petitioner Enron's brief.

SUMMARY OF THE ARGUMENT

Interstate electrical transmission bundled as part of a retail sale of electricity is, in every respect but for how it is marketed and billed to the consumer, exactly the same as any other interstate electrical transmission that FERC regulates. It should thus be subject to the same regulations and nondiscriminatory open access transmission provisions set forth in FERC Order Nos. 888, 888-A and 888-B (referred to collectively herein as "Order No. 888")[1] with respect to unbundled interstate transmissions of electrical energy.

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[1] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Transmitting Utilities*, Order No. 888 F.E.R.C. Stats. & Regs., Regulations Preambles January 1991-June 1996, ¶ 31,036 (1996); *Promoting Wholesale Competition Though Open Access Non-Discriminatory Transmission Services by Public Utilities and Transmitting Utilities*, Order No. 888-A, III F.E.R.C. Stats. & Regs. ¶ 31,048 (1997); *Promoting Wholesale Competition Though Open Access Non-Discriminatory Transmission Services by Public Utilities and Transmitting Utilities*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997).

Indeed, it makes little sense for FERC to implement rules designed to promote nondiscriminatory open access to all users of the interstate electric transmission grid and then determine that the majority of interstate transmission use is not subject to those rules.

An examination of the practical consequences of FERC's choosing not to exercise jurisdiction over interstate transmission when bundled with retail sales highlights why the Court should overrule the Court of Appeals' affirmance of FERC's renunciation of comprehensive jurisdiction over interstate transmission. FERC's refusal to make interstate transmission bundled with retail sales subject to nondiscriminatory open access rules automatically allows utilities to discriminate in favor of the utilities' own sales, denying others equal access to interstate transmission. Because FERC's jurisdiction over interstate transmission is exclusive, its determination that it lacks jurisdiction over the majority of interstate transmission uses has created an unnecessary and unacceptable regulatory gap over the interstate transmission that a utility claims is used to serve retail customers. This absence of uniform governmental oversight has allowed public utilities to manipulate schedules and system dispatch to their own benefit without fear of discovery or serious reprisal.

ARGUMENT

FERC's decision creates a regulatory gap through which utilities can avoid government regulation and oversight over the bulk of their interstate transmission. A closer look at the practical nature and consequences of FERC's truncation of its exclusive jurisdiction to prevent undue preference or discrimination in the provision of all interstate transmission service confirms the error of that decision.

I. FERC'S DISAVOWAL OF ITS EXCLUSIVE JURISDICTION RELIES ON A MEANINGLESS DISTINCTION TO CREATE A REGULATORY GAP OVER THE MAJORITY OF INTERSTATE TRANSMISSION SERVICES.

Under Section 205 of the FPA,[2] Congress vested in FERC the exclusive authority to bar public utilities from granting any undue preference or advantage to any person with respect to interstate electric transmission service. Because FERC has determined that it lacks exclusive jurisdiction over transmission bundled with retail sales, there now is no regulatory supervision—either federal or state—to prevent undue discrimination or preference in the reservation and use of nearly two-thirds of the interstate electric transmission capacity in this country, which is used by utilities to serve retail customers.[3] FERC's creation of this regulatory gap is based upon the fallacy, to which the Court of Appeals deferred, that interstate transmission, when part of a retail sale and not billed to the customer as a separate service,

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[2] 16 U.S.C. § 824(d).

[3] In 1999, 3.2 billion megawatts of electricity were sold at retail on a bundled basis. Energy Information Administration, United States Department of Energy, *Electric Sales and Revenue 1999* at 3 (2000) (hereinafter *Electric Sales and Revenue*). Of these, approximately 2.81 billion megawatt hours were sold at retail by FERC jurisdictional generators: 2.4 billion by investor-owned utilities and 410 million by independent power producers. *See* Energy Information Administration, United States Department of Energy, *Financial Statistics of Major U.S. Publicly Owned Electric Utilities 1999* at 3 (2000). At most, 988 million megawatt hours of that 2.81 billion megawatts, or 34.1 percent, was previously sold for resale. *Id.* And, only 76.2 million megawatt hours (2.4 percent of retail sales) were sold on an unbundled basis, with the remaining 97.6 percent sold on a bundled basis. *See Electric Sales and Revenue 1999* at 245, 255 (2000) (showing transmissions of 76 million megawatt hours sold pursuant to retail wheeling programs, *i.e.*, on an unbundled basis). In total, therefore, almost two-thirds (1.75 billion of 2.8 billion megawatt hours) of pertinent transmissions were bundled with retail sales.

ceases to exist as such, becoming instead merely part of a retail sale that is beyond the Commission's jurisdiction. This is a distinction without meaning, and it produces conditions under which load serving utilities serving—or purporting to serve—their own retail customers can freely discriminate against other interstate transmission users, including utilities from neighboring regions that require transmission access to deliver power purchased on behalf of their own bundled retail customers.

The bundled/unbundled distinction fails to recognize that the inherent nature of interstate transmission of electricity does not change merely because it is bundled for billing purposes as a component of a retail sale of electricity. A utility's use of interstate transmission on behalf of its retail customers has all the same physical characteristics, utilizes the same transmission facilities, and crosses the same interstate borders as all other interstate transmissions of electricity. The only difference is whether the utility labels transmission as a separate product.

For most of the prior century, the Commission's jurisdictional posture with respect to the transmission component of retail power service reflected the physical and commercial reality that transmission was used exclusively to deliver a bundled product to captive retail customers. That such transmission went unregulated was both pragmatic and understandable in view of the states' regulation of retail power sales and the near complete absence of wholesale competition. This is, however, an antiquated view. FERC's exercise of its exclusive jurisdiction can no longer lie dormant. Transmission services now are a separate and separable component of nearly every delivery of electric power and should be regulated consistent with FERC's exclusive jurisdiction and responsibility to prevent discrimination, which the states are unable to remedy.

Notwithstanding the fact that interstate transmission service is easily separated into a verifiable component of retail sales, FERC has renounced its exclusive jurisdiction over the interstate transmission component unless transmission-owning utilities—the very ones who benefit from discriminatorily controlling access to their transmission facilities—make the unlikely choice voluntarily to unbundle interstate transmission service from their retail electric sales, or are ordered to do so as part of a state electric restructuring program that would unbundle retail sales to allow customers to choose their own retail suppliers of electricity. FERC's action effectively permits the parochial business and regulatory interests of utilities and states to determine the scope of FERC's jurisdiction over interstate transmission and, consequently, FERC's authority to remedy undue discrimination through imposition of nondiscriminatory open access transmission.

Given that Congress has granted comprehensive and exclusive jurisdiction over interstate transmission to FERC, the agency's abdication of that authority is impermissible. Indeed, it is in direct conflict with this Court's holding in *Phillips Petroleum v. Wisconsin*, 347 U.S. 672 (1954), where the Court held that the jurisdiction of the Federal Power Commission was not intended to vary from state to state, depending upon the degree of state regulation and of state opposition to federal control.

II. FERC'S STATUTORY INTERPRETATION PERPETUATES CONDITIONS THAT ALLOW TRANSMISSION-OWNING UTILITIES TO EXERCISE UNDUE DISCRIMINATION AGAINST OTHER USERS OF THE UTILITIES' INTERSTATE TRANSMISSION SERVICES.

The Court of Appeals' affirmance of FERC's legal error improperly legitimizes FERC's refusal to guard against abuses in the use of interstate transmission and perpetuates conditions that allow transmission-owning public utilities to

discriminate in favor of their own power sales and against entities that are dependent upon those public utilities' transmission systems to deliver or receive electricity. The following examples illustrate certain discriminatory practices that transmission-owning utilities have employed and continue to employ against transmission-dependent members of EPSA in the absence of regulatory oversight of all interstate electrical transmission.[4]

Improperly Blocking Available Transfer Capacity By Overscheduling Transmission For Retail Loads: Not being subject to FERC's nondiscriminatory transmission access rules, transmission owning utilities with captive retail customers can "block" available transfer capability (*i.e.*, the capability of the physical transmission network to accommodate further commercial activity over and above its committed uses) across valuable transmission paths or segments of the interstate transmission grid. They do so by heavily reserving capacity for their own use over such segments, claiming that the transmission capacity is needed to serve their own retail customers, whether or not such a need exists. Regardless of whether such action is intentional or the result of inaccurate calculations of available transfer capability, the result is the same. By limiting the publicly available transfer capability over a particular transmission path, the utility can block transmission-dependent entities from acquiring or selling low-cost power over that same path, and thereby prevent others from competing with the utility for that low-cost power. For example, a utility can post no

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[4] FERC, in *Regional Transmission Organizations*, Notice of Proposed Rulemaking, F.E.R.C. Stats. & Regs. ¶ 32,541, 33,709-10 (1999), discussed a Petition for Rulemaking (which EPSA supported) submitted in FERC Docket No. RM98-5-000 that set forth these and other examples of discriminatory treatment. FERC referenced this petition to highlight the need for further rulemaking to address ongoing discriminatory practices not cured by Order No. 888.

available transfer capability for a path traversing its system (A to B), thereby precluding a low-cost seller on one side of its system from selling power directly to a buyer on the other side. At the same time, however, the utility may post substantial available capacity from a point internal to its system to exit the system at point B, and may import the low-cost power from point A into its own system ostensibly for use to serve its retail load. This imported power can then be resold by the utility to the buyer at point B at a marked-up price insulated from the low-cost competition that would otherwise have occurred at point B.

Improper Avoidance of Costs: A transmission provider can purchase energy for peak service to its own retail load, schedule the import of that energy for the following day, and designate itself as the user of the energy for its retail load. This allows the transmission provider to pay no separate transmission charge to import the energy into its service territory. In the hourly market for the following day, the transmission provider or its marketing affiliate can sell the energy as "non-peak" to a neighboring service area and pay only a transmission charge for exporting that energy. Other transmission customers, however, would be prohibited from scheduling such power for a day ahead without charge, "parking" that power, and then deciding to transfer energy out in the hourly market. Rather, the other customers would have to pay for transmitting that power *into and out of* the initial transmission provider's system. During off-peak periods when a transmission provider is selling at wholesale the power it has paid nothing to import, its wholesale competitors are severely and unfairly disadvantaged. Under FERC's interpretation of the FPA, because utilities do not have to disclose their transmission for bundled retail service, this conduct is difficult, if not impossible to detect.

Failing To Make Accurate Disclosure Of Available Transfer Capability: Another consequence of FERC's jurisdictional determination is that utilities do not have to procure transmission on a comparable basis to their competitors, and therefore, do not have to report transmission reserved for their retail loads on the Open Access Same-Time Information System ("OASIS"; an internet-based transmission availability and scheduling system on which public utilities must publicly post transmission availability and transactions pursuant to Order No. 888's companion order, FERC Order No. 889 [5]). As a result, these utilities have no incentive to produce accurate calculations of available transfer capability. This can cause serious difficulties for suppliers attempting to schedule electricity sales across their transmission facilities. These reporting inaccuracies are cumulative in effect across geographic regions, often resulting in the underreporting of additional available transfer capability. This underreporting has serious consequences for suppliers and marketers that rely on OASIS information to schedule their power sales to buyers, at times forcing them to incur substantial losses due to the inability to schedule into regions where the amount of available capacity has been underreported.

These examples illustrate how FERC's abandonment of its jurisdiction and its concomitant limitation of applicability of Order No. 888 effectively nullify nondiscriminatory open access to interstate transmission. They also depict the opportunities for utilities to manipulate and frustrate wholesale competition and eliminate incentives for public utility transmission providers to accurately disclose surplus transmission capacity, particularly when transmission capacity is in high demand.

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[5] *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, F.E.R.C. Stats. & Regs., Regulations Preambles, ¶ 31,036 (1996).

Moreover, FERC's determination that it lacks jurisdiction over bundled transmission makes redress of these discriminatory practices under FERC's general enforcement procedures nearly impossible. The lack of public access to a utility's retail load and transmission data creates a considerable informational void given that the majority of transmission reservations are for bundled retail customers. Without OASIS postings or any other regulatory oversight for the majority of transmissions, it is difficult, if not impossible, for FERC or any potential competitor to obtain information to prove that transmission owning utilities are engaging in discriminatory conduct by manipulating their scheduling and system dispatch to disadvantage wholesale transmissions (the only transmissions over which FERC lays claim). Moreover, the types of discriminatory actions described above occur within a period of minutes or hours. By the time FERC conceivably could take any action, a disadvantaged competitor's business opportunity would have passed.

Likewise, any complaints to a state utility commission would be limited to addressing a transmission-owning utility's manipulation of bundled retail sales over which the state would have jurisdiction. The states have no jurisdictional authority to order a utility to provide wholesale transmission service. Even if state jurisdiction could be established over a transmission dispute, there likely would be a preference for constituents served by the transmission-owning utility versus the interstate business interests of energy wholesalers, such as EPSA's members. Where a transmission-owning utility engages in discriminatory acts that restrict an electricity wholesaler from serving customers in a neighboring state, the issue is an interstate dispute that should be subject to FERC jurisdiction.

Put simply, without FERC regulation of all uses of interstate transmission, including the transmission component of bundled retail power sales, meaningful redress of

discrimination will remain difficult, if not impossible, to attain.

CONCLUSION

The Court of Appeals' decision should be reversed insofar as it affirms FERC's holding that its jurisdiction does not include interstate transmission bundled with local retail service.

Respectfully submitted,

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